NTSB Order No.
EM-146

UNITED STATES COAST GUARD
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 16th day of October, 1987

PAUL A. YOST, Commandant, United States Coast Guard,

v.

RAYMOND H. MATHISON, Appellant.

Docket ME-126

OPINION AND ORDER

Appellant challenges a March 6, 1987 decision of the Vice Commandant (Appeal No. 2445) affirming a suspension of his merchant mariner's license (No. 533836) for two months on twelve months' probation. The suspension was ordered by Coast Guard Administrative Law Judge Michael E. Hanrahan on January 16, 1986 following an evidentiary hearing completed on March 13, 1985.[1] The law judge had sustained a charge of misconduct on a specification that, as amended, alleged that appellant:

> "...while serving as Operator aboard M/V Belcher Pensacola...did, on or about 20 July 1984 after an underwater survey and the unauthorized repair of the tank barge Belcher No. 35 at Key West, Florida, wrongfully fail to make known to officials designated to enforce inspection laws, at the earliest opportunity, a marine casualty producing serious injury to said tank barge, in violation of 46 USC 3315."

On appeal to the Board, appellant contends that the Coast Guard's evidence did not prove the charge, but that, assuming, arguendo, that the charge was proved, the law judge abused his discretion by imposing a sanction that is disproportionate to the offense.[2] For the reasons that follow, we find no merit in appellant's contentions.

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[1]Copies of the decisions of the Vice Commandant (acting by delegation) and the law judge are attached.

[2]The Coast Guard has filed a reply opposing appellant's appeal.

The facts underlying the charge against the appellant are not disputed and may be briefly stated. On July 18, 1984, an oil-laden barge the M/V BELCHER PENSACOLA was towing grounded. The barge was freed and the vessels continued their voyage to Key West, Florida. An inspection of the barge there revealed a discrepancy in the level of cargo but no indication of contamination. On Friday, July 20, an underwater survey at Key West disclosed a 5 inch by 3/8 inch hole in the barge, and a temporary repair was made. Appellant and the other licensed operator serving aboard the BELCHER PENSACOLA prepared a report of the grounding and subsequently discovered damage on July 21, after the tug and barge returned to Miami, Florida.[3] The report, given to appellant's employer on that date, was mailed to the Coast Guard Marine Safety Office ("MSO") in Miami on July 23 and received by the Coast Guard at that office on July 24. On July 25, the MSO was notified by telephone that the barge had been involved in an oil spill causing pollution on July 24 at the Belcher facility in Miami.

The law judge, in sustaining the charge of misconduct, concluded that notification of the grounding and damage to the Coast Guard on July 24 did not satisfy the requirement of 46 USC §3315 to provide such information "at the earliest opportunity." He observed (Decision at page 12): "Had the Coast Guard received prompt notice and participated in the inspection and temporary repairs it is most likely that precautions would have been taken to prevent or minimize the pollution incident." Like the Vice Commandant, we perceive no basis for disturbing the law judge's conclusion that appellant did not comply with the statute.

Appellant's chief contention concerning the sufficiency of the evidence underlying the charge is that the Coast Guard failed to show that it had not received notice of the marine casualty prior to its receipt on July 24th of the report appellant had submitted. Absent such proof, according to appellant, it cannot be concluded that notice at the earliest opportunity had not been given. We find no merit in this contention.

Appellant might have a point if he had been charged with failing altogether to provide the notification the statute required. In those circumstances, the Coast Guard would have been obligated, in order to carry its burden of proof, to put on evidence establishing that no notice had been received from appellant or anyone acting on his behalf. But where, as here, the

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[3]The information was provided on a CG Form 2692, "Report of Marine Accident, Inquiry or Death," and was signed by appellant as "Captain."

issue is the timeliness of the notice the Coast Guard received on July 24, for a incident that occurred on the 18th, rather than whether the Coast Guard had received notice at all, we do not think the Coast Guard was required to show that it had not been notified of the casualty before the 24th. The July 24 notification itself constituted evidence relevant to the charge of untimeliness that was sufficient to shift the burden of persuasion to appellant to go forward with any proof he might have of an earlier notification.[4]

Appellant next contends that his notice should be deemed timely because it was filed within 5 days, the time period he asserts satisfies the requirements of 46 USC §6101(b) pertaining to the reporting of a marine casualty. We share the Vice Commandant's view that this contention is unavailing. As the Vice Commandant observed, appellant was charged under 46 USC §3315 with failing to report a "serious injury" to a vessel subject to inspection "at the earliest opportunity," not with failing to file a marine casualty report within five days. Thus, whether his report was timely under the provisions of some other statute is simply not relevant to the issue in this proceeding.[5]

Appellant was aware on Friday, July 20, 1984 that the

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[4]Since we do not agree with appellant that proof of no notification before July 24 was a "key element" in the Coast Guard's case, the law judge's error, acknowledge by the Vice Commandant, in stating that the charge sheet in effect established that no notice before that date had been received was harmless. Moreover, the claim that the Coast Guard produce, no evidence on this score is inaccurate. The testimony of the investigating officer essentially was that the Coast Guard, notwithstanding the July 24 receipt of appellant's notice, had no actual knowledge of the grounding or the repair before July 25, when it also learned of the spill the day before. While this witness' account of when the Coast Guard first learned of these matters may not be entitled to great weight, since some question was raised as to whether he was in a position to know whether notice had been given sooner at either Miami or Key West, his testimony provided some evidence on the matter.

[5]We also find no merit in appellant's suggestion that under the Federal Rules of Civil Procedure (Rule 6(a)) Saturday and Sunday should be excluded from any computation of the length of time it took him to notify the Coast Guard. The statute at issue here does not provide for a period of time within, which to do something. Thus, assuming, arguendo, that those rules apply, there is no computation that can be made that would dispose of the issue of timeless under section 3315.

grounding of the barge two days earlier had produced damage that had to be reported. Although no reason appears why such a report was not made, or could not have been made, on the date to the Coast Guard at Key West, he waited until the tug and barge returned to Miami on the following day to turn in a report. The report was then not delivered to the Coast Guard there, but to his employer, who did not mail the report to the Coast Guard until Monday. We think these facts clearly support the Coast Guard's conclusion that appellant did not meet his responsibility to "make known to officials designated to enforce [the inspection laws], at the earliest opportunity, [a] marine casualty producing serious injury to" the barge Belcher No. 35. See 46 USC §3315(a). In this connection, it should be observed that appellant's obligation under the statute is not altered by the fact that some of the delay in notifying the Coast Guard appears to have been attributable to delay on the part of his employer in forwarding the report to the Coast Guard. As the individual licensed to operate the vessel, the appellant bore the responsibility for a timely notification.

Appellant's contention that the sanction imposed by the law judge is disproportionate to the offense found proved is not supported by reference to any case involving similar facts, and we are not persuaded that a probated suspension constitutes too severe a sanction in the circumstances presented. We will not, therefore, disturb the law judge's judgment as to the proper sanction for appellant's violation of the statute.

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's appeal is denied, and

2. The orders of the Vice Commandant and the law judge imposing a suspension of appellant's mariner's license on probation are affirmed.

BURNETT, Chairman, GOLDMAN, Vice Chairman, LAUBER, NALL and KOLSTAD, Members of the Board, concurred in the above opinion and order.